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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

KASHMIR DHOOT,

Plaintiff and Respondent,

v.

DALWINDER DHOOT et al.,

Defendants and Appellants.

C052968

(Super. Ct. No.
CV028219)

Brothers defendant Dalwinder Dhoot and plaintiff Kashmir Dhoot, as partners, owned and operated two truck stops, also known as travel plazas. As often happens in familial business relationships, the brothers experienced a falling out and decided to dissolve the partnership and divide the assets. Dalwinder and Kashmir entered into a dissolution agreement, which contained arbitration language.

As the acrimony between the brothers increased, Dalwinder served Kashmir with a demand for arbitration and sought to rescind the dissolution agreement. Kashmir responded by filing an action seeking a judicial declaration that the dispute

Dalwinder sought to arbitrate was not subject to mandatory binding arbitration, and seeking a preliminary and permanent injunction. The trial court issued a temporary restraining order and order to show cause. Following briefing and argument, the trial court issued a preliminary injunction "to enjoin the parties from prosecuting the arbitration and all associated proceedings" in the dispute between the brothers. Dalwinder and his wife Gurdiv (collectively, Dalwinder) appeal, contending the dissolution agreement encompasses their claims and Kashmir waived any objection to arbitration. Kashmir argues Dalwinder's appeal is untimely. We find the appeal timely and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Both Kashmir and Dalwinder were born in Punjab, India. Dalwinder is the younger brother. After leaving India, the brothers engaged in various business enterprises for over 20 years. In 2004 they held equal shares in two California partnerships and two California corporations. These entities owned the business assets and personal residences of the parties. Kashmir served as president of both corporations.

In 1993 Kashmir and Dalwinder jointly entered into a lease to operate a truck stop in Lathrop called "Joe's Travel Plaza" (Lathrop travel plaza). A few years later the brothers purchased the Lathrop travel plaza and the underlying land. The partnership extensively renovated the travel plaza.

Lathrop travel plaza profits furnished the funds to put a down payment on a vacant lot in Pleasanton. The partnership

spent \$2.2 million to construct a new home for Dalwinder's family on the lot.

The brothers then decided to purchase an empty lot in Westley as the future home of "Joe's Travel Plaza II" (Westley travel plaza). The Westley travel plaza opened in 2003.

The relationship between the brothers began to sour in early 2004, when Dalwinder objected to Kashmir's financial operation of the travel plazas. In a memorandum, Dalwinder informed his brother that if a joint plan to remedy the financial situation could not be devised, dissolution of the partnership was the only alternative. Dalwinder contacted the partnership's attorney, Joseph Varni, and requested that he draft a formal dissolution agreement.

On March 1, 2004, Varni drafted a memorandum to the brothers confirming Dalwinder's wish to effect a "complete separation" of the partnership. The memo also listed the partnership's assets and liabilities to be divided. At Dalwinder's request, Varni also drafted a proposed term sheet for dissolution. The proposal stated each partner was to take one of the travel plazas. In addition, "This proposal must be accepted in its entirety by both partners and is designed to divide all of the assets at [sic] simultaneously. Time is of the essence because of the nature of the businesses at stake."

The following month, Dalwinder sent Varni a list of his proposed terms for the dissolution. Dalwinder proposed he take the Lathrop travel plaza and Kashmir take the Westley travel

plaza. The proposal also stated that once signed, "no one can change any thing, or make claims otherwise."

Varni prepared a final dissolution agreement (Agreement), signed by the parties on April 6, 2004. Under the Agreement, the parties were to exchange interests in the two jointly owned partnerships and corporations. The parties agreed to cooperate in expediting the exchange of interests and filing the appropriate documents with the appropriate government entities.

The Agreement also provided that within 30 days each party would execute the requisite corporate resignations and surrender share certificates to complete the change of ownership. In the end, Dalwinder and his wife would receive the Lathrop travel plaza and their personal residence. Kashmir and his wife would receive the Westley travel plaza and their personal residence. In addition, the Agreement required Dalwinder to pay Kashmir \$367,294.63. This payment reflected the equity value of Dalwinder's residence, which had been purchased with partnership funds.

The brothers carried out the Agreement after its execution. They divided the assets, and Dalwinder made the payment to Kashmir.

On March 21, 2005, Dalwinder's attorney sent a letter to Kashmir stating that Dalwinder intended to take action to rescind the Agreement. The correspondence states: "At this time it is our intention to seek an order from an arbitrator or a court suspending and declaring null and void the Dissolution Agreement" Dalwinder's attorney also stated Dalwinder

would request that the "court or arbitrator" fairly and equitably divide the business assets.

Between March 2005 and October 2005 an attorney for Dalwinder exchanged letters with an attorney for Kashmir, concerning a variety of disputes between the brothers.¹ During these exchanges, counsel discussed possible arbitrators and outlined some of the issues to be arbitrated.

On October 7, 2005, Dalwinder served Kashmir with a demand for arbitration (Demand), seeking rescission of the Agreement. The Demand set forth two claims: rescission of the Agreement under Civil Code section 1689, subdivision (b)(1) on the grounds of duress and mistake, and breach of fiduciary duty by Kashmir in his acquisition of the assets.

Kashmir filed a response to the Demand, denying the Agreement was the result of duress or mistake. The response also states: "Respondent at this time limits the arbitration to the matters agreed upon in the Dissolution Agreement." Kashmir also denied any breach of fiduciary duty.

Kashmir filed an action seeking a judicial declaration that the Agreement was valid and enforceable, and the dispute Dalwinder sought to arbitrate was not subject to mandatory binding arbitration. The court issued a "Temporary Restraining Order and Order to Show Cause re Preliminary Injunction."

¹ During this period, Varni did not represent either of the brothers, who each retained separate counsel.

Following oral argument, on April 11, 2006, the court entered an "Order After Hearing re Order to Show Cause re Preliminary Injunction." The order granted Kashmir's motion and provided that "[a] preliminary injunction shall issue to enjoin the parties from prosecuting the arbitration and all associated proceedings in the matter"

The preliminary injunction was entered on June 5, 2006. Dalwinder filed a notice of appeal on June 16, 2006.

DISCUSSION

Timeliness of Dalwinder's Appeal

Kashmir asserts we lack jurisdiction to consider Dalwinder's appeal since it was not timely filed. According to Kashmir, the appealable order was the order granting or dissolving the injunction. (Code Civ. Proc., § 904.1, subd. (a)(6); *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1056.)

The court entered the order granting Kashmir's injunction on April 11, 2006. Kashmir argues Dalwinder had 60 days in which to file his appeal. However, Dalwinder filed his appeal on June 16, 2006, 66 days after notice of entry of the order. Therefore, Kashmir contends, the appeal was untimely and we lack jurisdiction.

Dalwinder disagrees, noting the April 11, 2006, minute order expressly provided that a formal, signed preliminary injunction was required before it became effective. Therefore, under California Rules of Court, former rule 2(d)(2), now rule 8.104(d)(2), the time for appeal began to run on June 5,

2006, when the signed preliminary injunction was entered. We agree.

Rule 8.104(d)(2) of the California Rules of Court states, in pertinent part: "The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed"

The April 11, 2006, order states, in pertinent part: "Plaintiff, Kashmir Dhoot, shall prepare and submit to the court and opposing counsel the proposed preliminary injunction in a manner consistent with California Rules of Court, Rule 391 [now rule 3.1312]. [¶] . . . The temporary restraining order issued on January 5, 2006 . . . shall remain in effect until the preliminary injunction authorized by this Order has been submitted, signed, and issued by this court."

The preliminary injunction was signed and entered on June 5, 2006. Therefore, Dalwinder's notice of appeal filed on June 16, 2006, was timely.

Standard of Review

Arbitration is consensual in nature. It may be invoked as an alternative to the settlement of disputes through the courts at the request of the parties. A party cannot be compelled to arbitrate a dispute he has not agreed to submit. Although public policy favors arbitration, this policy cannot displace the necessity for a voluntary agreement to arbitrate. To be enforceable, the parties must openly and fairly enter into an

agreement to arbitrate. (*Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1505.)

Code of Civil Procedure section 1281.2 states, in part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists*, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement." (Italics added.)

Under section 1281.2 of the Code of Civil Procedure, it is the trial court that determines if there is a duty to arbitrate a particular controversy between the parties. To make this determination, the court must examine and, to a limited extent, construe the underlying agreement. Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration, unless it is clear that the arbitration clause cannot be interpreted to cover the dispute. (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 652 (*Engineers & Architects*).)

In ruling on a petition to compel arbitration, the trial court may consider evidence on factual issues relating to the threshold issue of arbitrability, for example, whether under the facts before the court the contract excludes the dispute from

its arbitration clause or includes the issue within the clause. Parties may submit declarations when factual issues are tendered with a motion to compel arbitration. (*Engineers & Architects, supra*, 30 Cal.App.4th at p. 653.)

Arbitration and the Dissolution Agreement

Dalwinder seeks to void the entire Agreement and argues that the Agreement's arbitration provision applies to his efforts. Kashmir counters that the Agreement's arbitration provisions cover the specific provisions of the Agreement, not the Agreement itself. The trial court agreed with Kashmir and found the arbitration provision did not apply to Dalwinder's suit to have the Agreement rescinded.

Dalwinder focuses exclusively on one of the Agreement's provisions. Paragraph 16 states: "The partners shall make a good-faith effort to settle any issues that result from the attempt to exchange these partnership or corporate interests and shall submit any disputes or claims to arbitration under the rules of the American Arbitration Association then in effect. Judgment or arbitration awards may be entered by any court with appropriate jurisdiction."

According to Dalwinder, his claim for rescission under the Agreement and his claim for breach of fiduciary duty are both "disputes" under paragraph 16. Under the plain language of the provision, Dalwinder argues, any dispute, including a dispute over the validity of the Agreement, is subject to mandatory arbitration.

Kashmir counters that paragraph 16 must be read in conjunction with the Agreement as a whole. The Agreement requires the parties to carry out numerous steps in order to effect the dissolution of the partnership. Kashmir argues paragraph 16 was intended to apply to any disputes that might arise between the brothers in carrying out these steps.

In support of this interpretation, Kashmir notes paragraph 18 of the Agreement. Paragraph 18, which Kashmir characterizes as the dispute resolution clause, states: "The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties under this Agreement, shall be construed pursuant to and in accordance with the laws of the State of California. If a claim is asserted in any arbitration or legal proceeding, the parties irrevocably agree that jurisdiction and venue for any such action or arbitration proceeding shall be in the County of San Joaquin, State of California."

Kashmir reasons: "If, as Dalwinder now argues, paragraph 16 had been intended to be a sweeping agreement to arbitrate every conceivable dispute, than the dispute resolution clause's reference to the possibility of a 'legal proceeding' or 'action' in the courts of the County of San Joaquin would be nonsense." In response, Dalwinder counters that "legal proceedings" are not inconsistent with arbitration, since they are required to confirm an arbitration award.

To interpret an arbitration clause we consider it in context with all of the other provisions in the agreement. The

whole of the agreement is to be taken together, each clause helping to interpret the other. Language in the agreement must be construed in the context of that instrument as a whole and cannot be found to be ambiguous in the abstract. Furthermore, contractual language is interpreted in its popular and ordinary sense unless the parties expressed a contrary intent. We will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists. (*In re Tobacco Cases I* (2004) 124 Cal.App.4th 1095, 1106-1107.)

The parties designed the Agreement to effectuate the dissolution of the brothers' partnership. To this end, the Agreement specifies 14 steps the parties must take under the Agreement. These steps include executing corporate resolutions and resignations, surrendering stock, dividing up the real estate, reimbursement to equalize the division, maintaining separate lines of credit, and taking responsibility for the business they receive on dissolution.

Paragraph 16 appears at the end of this list of specific duties and requirements. It states, in part: "The partners shall make a good-faith effort to *settle any issues that result from the attempt to exchange these partnership or corporate interests and shall submit any disputes or claims to arbitration*" (Italics added.) Paragraph 16 specifically references issues resulting from the attempt to exchange partnership interests, the requirements set out previously in the Agreement. It requires good faith on the part of Kashmir and Dalwinder in their efforts to settle "issues"

arising from the steps in the dissolution process. Paragraph 16 then requires "any disputes or claims" be submitted to arbitration.

When read in context, the phrase "any disputes or claims" refers to disputes or claims arising out of the failure of the brothers' good faith efforts to settle conflicts over the dissolution process itself. Paragraph 16 sets forth a process for dealing with disagreements over how to carry out the Agreement's requirements: first, good faith efforts to settle the disagreement, which if unsuccessful will be followed by mandatory arbitration of those dissolution issues. A challenge to the very validity of the Agreement is unconnected to disputes over the various steps the Agreement sets forth on the road to dissolution. Therefore, a challenge to the Agreement itself does not fall within the arbitration provisions of Paragraph 16.²

² We distinguish the present case from the arbitration agreement considered by the Supreme Court in *Reigelsperger v. Siller* (2007) 40 Cal.4th 574 (*Reigelsperger*). In *Reigelsperger*, the parties entered into an arbitration agreement concerning medical treatment. The agreement required arbitration of "'any dispute'" as to medical malpractice. The agreement also stated it was intended to bind the patient and physician who "'now or in the future'" treats the patient. The patient also signed an informed consent form stating the form was intended to cover treatment for the patient's current condition "'and for any future condition(s)'" for which treatment was sought. (*Id.* at p. 577.) The patient argued the agreement did not apply to subsequent treatment of a different condition. However, the Supreme Court disagreed, finding the informed consent form must be read in conjunction with the arbitration agreement. These documents, when read together, evinced an intent of the parties to arbitrate disputes arising out of future treatment. (*Id.* at pp. 579-580.) Here, the various sections of the Agreement, when

This reading of paragraph 16 comports with the language of paragraph 18. Paragraph 18 contemplates claims asserted in both arbitration and legal proceedings. Dalwinder's contention, that a challenge to the very validity of the Agreement as well as challenges to the specific Agreement provisions must be arbitrated, leaves nothing to be decided in the trial court. This interpretation makes paragraph 18 superfluous.

Nor are we persuaded by Dalwinder's argument that "legal proceedings" are not inconsistent with arbitration. Paragraph 18 states, "If a *claim* is asserted in any arbitration or legal proceeding" (Italics added.) Confirmation of an arbitration award is not such a claim, nor is a judgment on that award.

When read in context, paragraph 16 mandates arbitration for disputes over the attempt to exchange the partnership interests as specified in the preceding sections of the Agreement. A claim over the validity of the entire Agreement, as distinct from a claim over carrying out the terms of the Agreement, is not governed by paragraph 16. The trial court correctly determined that Kashmir is not required to arbitrate Dalwinder's claim that the Agreement is void.

Waiver

Dalwinder contends Kashmir agreed to arbitrate Dalwinder's claim, waiving any objections to arbitration. According to

read together, do not reveal any intent to arbitrate challenges to the Agreement in its totality.

Dalwinder, Kashmir agreed to arbitration and the parties proceeded to arbitration "almost to the date it was set." Dalwinder asserts that Kashmir voluntarily participated in the establishment of arbitration, the selection of the arbitrator, and all of the extensive prehearing procedures.

Kashmir objects to this characterization of his involvement in the arbitration process. Kashmir agrees his counsel participated with Dalwinder's counsel in discussions about arbitration of a variety of claims, but Dalwinder never made it clear that he was challenging the validity of the Agreement itself. Instead, the parties discussed arbitration in the context of a variety of issues, all based on the steps required by the Agreement. Since Kashmir never agreed the validity of the Agreement was the subject of the discussed arbitration, there can be no waiver.

Our review of the record supports Kashmir's characterization of the communications between the parties regarding arbitration. In the initial correspondence between the parties on March 21, 2005, Dalwinder's attorney raised the issue of voiding the entire Agreement. However, the letter states: "[I]t is our intention to seek an order from an arbitrator *or a court* suspending and declaring null and void the Dissolution Agreement" (Italics added.) Thus, the correspondence did not notify Kashmir of Dalwinder's intent to arbitrate the validity of the Agreement; instead, it presented arbitration as one option.

The continuing contact between the parties that did discuss arbitration focused on various disagreements over the dispersal of assets and equalizing payments. During this period, the parties selected an arbitrator, discussed procedural matters, and scheduled the arbitration.

Dalwinder contends these activities show Kashmir acquiesced to arbitration of Dalwinder's claim that the entire Agreement was void. However, none of the correspondence that discusses arbitration sets forth the Agreement's validity as the issue to be arbitrated. Instead, the correspondence discusses the mechanics of the dissolution and the parties' unhappiness over the efforts to dissolve the partnership.

The present case differs from the authorities Dalwinder cites. In *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, the defendant orally stipulated in open court that the parties could be ordered to arbitration and never contested the validity of the order until the plaintiff filed a petition to confirm the award. (*Id.* at pp. 676-677.) The court found the doctrines of waiver and estoppel, plus the prejudice to the plaintiff, barred the defendant's challenge to the arbitration. (*Id.* at p. 679.)

In *Nghiem v. NEC Electronic, Inc.* (1994) 25 F.3d 1437, the plaintiff initiated the arbitration, attended hearings, presented evidence, and submitted a 50-page closing brief. (*Id.* at p. 1439.) The court found these arbitration activities represented a waiver of any objection to the arbitration. (*Id.* at p. 1440.)

In *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Union* (1980) 611 F.2d 580, the entire grievance between the parties was presented to the arbitrator without reservation. Only after the arbitrator decided an issue adversely to the employer did the employer question the arbitrator's jurisdiction. The court found the employer waived any such objection. (*Id.* at p. 584.)

In each of these cases, the party resisting arbitration participated willingly in arbitration, challenging arbitration only after the fact. Here, Kashmir participated in choosing an arbitrator and making preliminary procedural decisions. However, the issues discussed during these preliminary negotiations did not include the validity of the Agreement; instead, the parties discussed various aspects of the Agreement. Kashmir objected to the arbitration early on after ascertaining Dalwinder's intent to arbitrate the Agreement itself. We find the authorities cited by Dalwinder inapplicable.

From this record, it cannot be said Kashmir assented to arbitrate the issue of the Agreement's validity, and therefore Dalwinder's waiver argument fails.

DISPOSITION

The judgment is affirmed. Kashmir shall recover costs on appeal.

We concur: _____ RAYE _____, J.

_____ NICHOLSON _____, Acting P.J.

_____ HULL _____, J.